No. 9 Orig.

Petition for Mandamus.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES.

W. P. CONNAWAY, AS RECEIVER OF THE MOSCOW NATIONAL BANK OF MOSCOW, IDAHO, PETITIONER,

vs.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NINTH CIRCUIT, RESPONDENTS.

PETITION FOR A WRIT OF MANDAMUS.

W. L. HILLYER,
Attorney for Petitioner

CURTIS HILLYER,
OLIN L. BERRY,
of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

W. P. CONNAWAY, RECEIVER OF THE MOSCOW NATIONAL BANK OF MOSCOW, IDAHO, PETITIONER,

vs.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NINTH CIRCUIT, RESPONDENTS.

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W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, a Corporation, Plaintiffs, *vs.* O. P. OVERTON and C. A. HOFFER, Defendants.

Action brought in the said Circuit Court and the Complaint filed in the office of the Clerk of said Circuit Court, in the City and County of San Francisco.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, Greeting; To

O. P. Overton and C. A. Hoffer, defendants:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit
6 Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and ninety eight, and of our independence the one hundred and twenty second.

[SEAL.] SOUTHARD HOFFMAN, Clerk.
By W. B. BEAIZLEY, Deputy Clerk.

That on the 5th day of April, 1898, the Marshal made his return of service of said summons, in the words and figures following,
7 to wit:

RETURN OF SUMMOMS.

UNITED STATES MARSHAL'S OFFICE,
Northern District of California.

I hereby certify that I received the within writ on the 30th day of March, 1898, and personally served the same on the 30th day of March, 1898, by delivering to and leaving with C. A. Hoffer, said defendant named therein personally, at Santa Rosa, County of Sonoma, in said district, a certified copy thereof, together with a copy of the complaint, certified to by plaintiff's attorney, attached thereto.

And I hereby certify that I was unable to make personal service on O. P. Overton, as he was very sick and was not permitted to see any one, under instructions of his physician.

BARRY BALDWIN, U. S. Marshal,
8 By J. A. LITTLEFIELD, Deputy.

SAN FRANCISCO, April 5th, 1898.

That thereafter, on the 13th day of April, 1898, and before the service of summons upon him, said O. P. Overton died, having first made and published his last will and testament in writing, and having thereby constituted one John P. Overton, executor thereof, and that thereafter said J. P. Overton proved said last will and duly qualified as executor thereof, and that letters testamentary were issued to him.

That thereafter, to wit, on the 15th day of March, 1899, said facts having been brought to the notice of the Court, your petitioner, the plaintiff in said action, moved the Court for an order directing that a writ of *scire facias* issue directed to said Overton, executor, and said motion was granted and said order made, which order is in the words and figures following, to wit:

ORDER FOR WRIT OF SCIRE FACIAS.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, Plaintiff, *vs.* O P. OVERTON and C. A. HOFFER, Defendants.

MARCH TERM, 1899.

March 15, 1899.

Upon the application of the plaintiff's attorneys, and upon the suggestion by them of the death of the defendant, O. P. Overton, it is ordered that a writ of *scire facias* issue herein directed to John P. Overton, in accordance with the provisions of Section 955 of the Revised Statutes of the United States.

That thereupon and in accordance with said order, upon the 15th day of March, 1899, there was issued from said Court a writ of *scire facias* in the words and figures following, to wit:

WRIT OF SCIRE FACIAS.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, Plaintiff *vs.* O. P. OVERTON and C. A. HOFFER, Defendants.

UNITED STATES OF AMERICA ss.

THE PRESIDENT OF THE UNITED STATES:

To John P. OVERTON, Executor of the last Will and Testament of O. P. OVERTON, deceased.

GREETING.

Whereas, On the 28th day of March, 1898, the above named plaintiff commenced the above entitled action in the above entitled Court against the above named defendants, for the recovery of a judgment against them in the sum of ten thousand dollars, being the amount of an assessment duly made and levied by the Comptroller of the Currency of the United States, upon said defendants as owners and holders of one hundred shares of the capital stock of the Mos-
11 cow National Bank, said bank being then in process of liquidation under said Comptroller, in the manner provided by law, which said asessment defendants had failed and refused to pay;

And whereas, thereafter, on the 13th day of April, 1898, said O. P. Overton died, having first duly made and published his last will and testament in writing, and thereby constituted you, John P. Overton, as executor thereof; and after the death of said O. P. Overton, you thereupon duly proved the said last will and testament and took upon yourself the burden of the execution thereof, as by the information of plaintiff the above named Court has been given to understand.

Wherefore, the said W. P. Connaway, plaintiff, hath humbly besought the Court above entitled, to provide him with a proper remedy in this behalf, and it being proper that what is just in this be-
12 half should be done:

You are hereby commanded within twenty days after the service upon you of this writ, to appear and become a party to this suit, according to the provisions of Section 955 of the Revised Statutes of the United States, or show cause why you should not, otherwise judg ment may be taken against the estate of said deceased in like manner as if you had voluntarily made yourself a party.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at the City and County of San Francisco, State of California, the 15th day of March 1899.

SOUTHARD HOFFMAN, Clerk of the U. S. Circuit, Ninth Circuit, Northern District California

That said writ was duly delivered to the Marshal for service and was thereafter, to-wit, on the 21st day of March, 1897, served upon said John P. Overton, as executor of the last will and testament of O P. Overton, deceased.

13 That the Marshal made a return in the words and figures following, to-wit:

RETURN TO WRIT OF SCIRE FACIAS.

United States of America, Northern District of California. I hereby return that I served the annexed writ on the therein-named John P. Overton, by handing to and leaving a true and correct copy thereof with John P. Overton, personally, at Santa Rosa, Sonoma Co., in said District on the 21st day of March, A. D., 1897.

JOHN H. SHINE, U. S. Marshal.
By J. J. GALLAGHER, Office Deputy.

That thereafter on the 8th day of April 1899, said John P. Overton, by his Attorneys, Thos. Rutledge and Jesse W. Lilienthal, served upon the attorneys for plaintiff and filed his notice of motion to set aside the scire facias aforesaid, in the words and figures following, to-wit:

NOTICE OF MOTION TO SET ASIDE WRIT OF SCIRE FACIAS.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, Plaintiff, vs. A. P. OVERTON and C A. HOFFER, Defendants.

14 To the plaintiff herein, and to BYRON WATERS, Esq., and JOHN T. MORGAN, Esq., his a torneys:

Please take notice that upon the files, papers, proceedings and records herein, and upon oral testimony to be introduced at the hearing of said motion, the undersigned, not appearing generally but only specially for the purposes of this motion, will move this Honorable Court, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, on April 17, 1899, for an order setting aside the scire facias issued herein under date of March 15, 1899, and the attempted service thereof.

15 Said motion will be made upon the ground that defendant, Overton, died before the service upon him of any process, that no process was ever served upon him herein and that this action was never pending against him; and upon such other grounds as to the Court may seem proper.

Dated April 8, 1899.

JESSE W. LILIENTHAL,
THOMAS RUTLEDGE.

Attorneys for said John P. Overton, executor, appearing only especially for the purposes of this motion and expressly protesting that this Court has not acquired jurisdiction over him.

That said motion came on to be heard before the Court on the 5th day of June and the matter having been submitted to the Court for its decision; thereafter on the 12th day of June 1899, the Court rendered its decision, and caused an order to be made and entered in the words and figures following, to-wit:

ORDER SETTING ASIDE WRIT OF SCIRE FACIAS.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank, of Moscow, Idaho, Plaintiff, vs. O. P. OVERTON and C. A. HOFFER, Defendants.

June 12, 1899.

The motion of John P. Overton, executor of the last will and testament of the defendant, O. P. Overton, deceased. to quash the writ of scire facias heretofore issued and directed to him herein, heretofore submitted and being now fully considered, it is ordered that said motion be and the same hereby is granted.

Further ordered that plaintiff be allowed an exception to this order and ten days from this date within which to prepare and file a bill of exceptions to the foregoing ruling.

To which order petitioner duly excepted, and by order of Court his exception was entered of record to and within the time allowed by the Court, petitioner presented his bill of exceptions to the order aforesaid, and the same was settled and allowed.

That thereafter, to wit, on the 12th day of June, 1899, upon the suggestion of the death of the defendant, O. P. Overton, said Court made an order substituting J. P. Overton as executor of the last will and testament of O. P. Overton, deceased, as defendant, and ordering that an alias summons issue to said J. P. Overton, as executor, etc., which order is in the words and figures following, to wit:

ORDER OF SUBSTITUTION AND FOR ALIAS SUMMONS.

W. P. CONNAWAY, Receiver, *vs.* O. P. OVERTON.

In this cause it was, on motion of plaintiff's counsel, ordered that John P Overton, executor of the last will and testament of O.
16 P. Overton, deceased, be and he hereby is substituted as a defendant in place and stead of said O. P. Overton, deceased, herein, and that an alias summons issue, directed to said John P. Overton, as executor, etc., requiring him to appear and answer the complaint within the time allowed by law.

That said summons was duly issued and was in the words and figures following, to wit:

ALIAS SUMMONS.

17 UNITED STATES OF AMERICA:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, a Corporation, *vs.* JOHN P OVERTON, as Executor of the last Will and Testament of O. P. OVERTON, deceased, and C. A. HOFFER, Defendants.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the City and County of San Francisco.

J. P. Overton, as Executor of the last Will and Testament of O. P. Overton, deceased, defendant:

You are hereby, as you have heretofore been, directed to appear and answer the complaint in an action entitled as above, brought
18 against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this County; or within thirty days, if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

Witness the Honorable Melville W. Fuller Chief Justice of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of our independence the one hundred and twenty-third.

[SEAL.] SOUTHARD HOFFMAN, Clerk,

By W. B. BEAIZLEY, Deputy Clerk.

RETURN OF SERVICE ON ALIAS SUMMONS.

UNITED STATES MARSHAL'S OFFICE,
Northern District of California.

I hereby return that I received the within writ on the 20th day of June, 1899, and personally served the same on the 12th day of July, 1899, upon John P Overton, by delivering to and leaving with John P. Overton, said defendant named therein, personally, at the County of Sonoma, in said district, a certified copy thereof, together with a

copy of the complaint, certified to by plaintiff's attorneys, attached thereto.

JOHN. H. SHINE, U. S. Marshal,
By J. A. LITTLEFIELD, Office Deputy.

San Francisco, June 13, 1899.

That said alias was duly issued and delivered to the Marshal for service, and was on the 12th day of July served upon said J. P.
19 Overton, executor, etc.

That thereafter, to wit, on the 11th day of August, 1899, said J. P. Overton by his attorneys served upon the attorneys for plaintiff, and filed his notice of motion to set aside the aforesaid order of substitution and quash the alias summons which said notice was in the words and figures following, to-wit:

NOTICE OF MOTION TO VACATE SERVICE OF SUMMONS.

In the Circuit Court of the United States, for the Northern District of California.

W. P. CONNAWAY, as Receiver of the Moscow National Bank of Moscow, Idaho, a corporation, Plaintiff, vs. O. P. OVERTON and C. A. HOFFER, Defendants.

To the plaintiff herein, and to BYRON WATERS, Esq., and to
20 JOHN T. MORGAN, Esq., his attorneys:

Please take notice that upon the files, papers, pleadings, proceedings and records herein, and upon oral testimony to be introduced at the hearing of said motion, the undersigned, not appearing generally, but only specially, for the purposes of this motion, will move this Honorable Court, at 10 o'clock A M., or as soon thereafter as counsel can be heard, on the 28th day of August, 1899, for an order setting aside and vacating the order made herein, *ex parte* on June 12, 1899, substituting John P. Overton as executor, etc., as a defendant in the place of O. P. Overton, deceased, and directing the issue of an alias summons; and to set aside the attempted service of said alleged alias summons.

Said motion will be made upon the ground that said O. P.
21 Overton died before the service upon him of any process herein, that said alleged alias summons is not in the form required by law, and upon such other grounds as to the Court may seem proper.

Dated August 11, 1899.

JESSE W. LILIENTHAL,
THOMAS RUTLEDGE,

Attorneys for John P. Overton, appearing only specially for the purposes of this motion, and expressly protesting that this Court has not acquired jurisdiction over him.

That the matter came on to be heard on the 20th day of November, 1899, and the matter having been submitted on the 4th day of December, 1899, the Court rendered its decision, and caused to be made and entered, an order setting aside the order of substitution and quashing said alias summons, which order is in the words and figures
22 following, to wit:

ORDER VACATING SERVICE OF ALIAS SUMMONS.

W. P. CONNAWAY, Receiver, etc., vs. O. P. OVERTON, *et al.*

The opinion of the Court herein, having been this day filed, it is in accordance therewith ordered that defendant's motion to set aside the order of substitution of John P. Overton, executor of the last will and testament of O. P. Overton, deceased, as defendant, and to set aside attempted service of alias summons herein be, and the same hereby is granted, and it is further ordered that the plaintiff be allowed an exception to this ruling, and that he have ten days to prepare, serve and file, a bill of exceptions herein.

That the ground upon which said Court set aside the service of
23 summons aforesaid, was that the action had abated by the death of said O. P. Overton before the service of process upon him.

That by reason of the Circuit Court having refused to take jurisdiction of said action, the petitioner has been deprived of justice, and that he has no plain, speedy, or adequate remedy at law.

Wherefore petitioner prays that a Writ of Mandamus issue from this Court to the judges of the Circuit Court of the United
24 States for the Ninth Circuit, commanding them to take jurisdiction and proceed against John P. Overton as executor of the last will and testament of O. P. Overton, deceased in the said action brought as aforesaid by this petitioner.

And your petitioner will ever pray.

W. L. HILLYER,

Attorney for Petitioner.

CURTIS HILLYER,

OLIN L. BERRY,

Of Counsel.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } ss.

Curtis Hillyer, being first duly sworn, says that he is one of the counsel for the petitioner in the above entitled proceeding, that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true; affiant further says that the reason he makes this affidavit is that the petitioner is absent from the City and County of San Francisco, in which County affiant, his attorney, resides.

CURTIS HILLYER.

Subscribed and sworn to before me this 17th day of February, 1900.

[SEAL] MATTHEW BRADY,

Notary Public in and for the City and County of San Francisco, State of California.

No. 9 Orig.

MAR 15 1900
JAMES H. McKENNEY,
Clerk.

Brief of Hillyer for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899

Filed Mar 9 1900.

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W. P. CONNAWAY, AS RECEIVER OF THE MOSCOW NATIONAL BANK OF MOSCOW, IDAHO.

Petitioner.

vs.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NINTH CIRCUIT.

Respondents

BRIEF OF PETITIONER ON MOTION FOR A WRIT OF MANDAMUS

W. L. HILLYER,

Attorney for Petitioner

CURTIS HILLYER,
OLIN L. BERRY,
of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899

No. ——

W. P. CONNAWAY, AS RECEIVER OF THE MOSCOW NATIONAL BANK OF MOSCOW, IDAHO.

Petitioner.

VS.

THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE NINTH CIRCUIT.

Respondents

BRIEF OF PETITIONER ON MOTION FOR A WRIT OF MANDAMUS

BRIEF FOR PETITIONER.

Two interesting and novel questions are presented on this application:

First: What is the meaning and effect of Section 955 of the Revised Statutes providing for revival of actions by *scire facias* in case of decease of one of the parties?

Second: Is it necessary, in order that an action should not abate by death of a party, that process should be served upon that party in his lifetime?

This is an application for a writ of *mandamus* commanding the Judges of the Circuit Court for the Ninth Circuit, to take jurisdiction of an action brought in the said circuit, entitled W. P. Connaway, as Receiver of the Moscow National Bank, Plaintiff, *vs.* O. P. Overton and C. A. Hoffer, Defendants.

We will state the facts in the language of the opinion of the court below, rendered upon motion to set aside the service of a summons in said action.

The case of Connaway v. Overton "is an action at law, brought by the Receiver of the Moscow National Bank of Moscow, Idaho, against O. P. Overton and C. A. Hoffer, who are alleged to be the holders of one hundred (100) shares of the capital stock of said bank, of the par value of one hundred dollars per share. It is alleged that the Comptroller of the Treasury of the United States made an assessment of one hundred (100) dollars per share on all shares of the capital stock of the Moscow National Bank on June 14, 1897, for the purpose of paying its liabilities, and this assessment the stockholders were ordered to pay on or before July 14, 1897, due notice of which assessment and order was given to the defendants: that defendants became indebted to plaintiff in the sum of $10,000, with interest thereon at seven per cent per annum, since June 14, 1897, and had paid no part of the same.

"The complaint was filed on March 28, 1898, and on the same day plaintiff filed a praecipe directed to the clerk of the court for a summons and two certified copies of the summons directed to the defendants in the cause and for two certified copies of the complaint for service. The clerk thereupon issued the summons and the certified copies thereof, together with copies of the complaint, as requested.

"On April 5, 1898, the marshal returned the summons into the clerk's office, with the certificate that on the 30th day of March, 1899, he had served the defendant Hoffer, and that he was unable to make personal service on the defendant O. P. Overton, as he was very sick, and 'he was not permitted to see any one under instructions of his physician.' No service of process was ever made upon the defendant O. P. Overton.

"On September 3, 1898, the default of C. A. Hoffer was entered. On

March 15, 1899, a writ of *scire facias* was, on motion of plaintiff, issued out of the Circuit Court to John P. Overton, executor of O. P. Overton, deceased, which writ was subsequently quashed.

"On June 6, 1899, plaintiff filed the suggestion that on the 13th day of April, 1898, defendant O. P. Overton died, and that since that time John P. Overton had been appointed and qualified as executor of his estate. On June 12, 1899, the court entered order that John P. Overton, executor of the last will and testament of the defendant O. P. Overton, deceased, be substituted as a defendant in the place of the said O. P. Overton, deceased, and that alias summons issue directed to John P. Overton, as executor, etc., requiring him to appear and answer the complaint within the time allowed by law. An alias summons was thereupon issued to John P. Overton, executor, on July 14, 1899."

After the service of the alias summons a motion was made to set aside the service of that summons and the order of the court substituting John P. Overton, as executor, as defendant, in place of O. P. Overton, deceased. Overton appeared specially for the purpose of protesting that the court below had not acquired jurisdiction over him, and moved the court to set aside the order of substitution and the service of the summons. The motion was granted.

This order not being a final judgment, no writ of error could be taken thereon, and the plaintiff in the action below is compelled to seek his remedy by application to this court for a writ of *mandamus*,

Davis v. Rankin Building and Manufacturing Company, 18 U. S. Appeals, 476;

Baltimore and Ohio Railroad Co. v. Myers, 18 U. S. App. 569;

In re Mudsill Mining Co., 31 U. S. App. 112;

In re Iron County, Michigan, 37 U. S. App. 622;

Cabot v. McMaster, 124 U. S. 571;

The Alliance, 70 Fed. 273;

United States v. Severus, 71 Fed. 768;

Carson v. Combe, 86 Fed. 202-210;

Chicago, St. Paul etc. Railroad v. Roberts, 141 U. S. 690.

mandamus being the proper proceeding to compel a tribunal to take jurisdiction of a matter when, believing that it has no jurisdiction, it has refused to do so.

Ex parte Russell, 13 Wallace, 664;

Railroad Company v. Wiswall, 23 Wall. 507;

Ex parte Schollenberg, 96 U. S. 369;

Harrington v. Holler, 111 U. S. 796;

Ex parte Parker, 120 U. S. 737;

Holland Parker, Petitioner, 131 U. S. 221-227;

Beguhl v. Swan, 39 Cal. 411;
Temple v. Superior Court, 70 Cal. 211;
Stanquist v. Hebbard, 122 Cal. 268;
Miller v. Bay Circuit Judge, 41 Mich. 327;
People v. Swift, 59 Mich. 529;
Queen v. Goodrich, L. J. R. N. S., vol. 19, p. 414.

Petitioner contends that the court below acquired jurisdiction, first, by the writ of *scire facias*, and second, if that was ineffectual, by the substitution of the executor, and the service of the summons pursuant to the order of substitution.

It makes no difference by which proceeding the court acquired jurisdiction. Whether it acquired jurisdiction by the *scire facias* or by the order of substitution and service of the new summons, in either case the attempt of the court to divest itself of jurisdiction was ineffectual and the divesting order void.

I.

UNDER SECTION 955 OF THE REVISED STATUTES, SCIRE FACIAS IS A PROPER MEANS OF BRINGING IN THE EXECUTOR OF A DECEASED PARTY.

Section 955 of the Revised Statutes, upon which the writ of *scire facias* was based, is in the following language:

"When either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survived by law, prosecute or defend such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause, and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is pending, twenty days beforehand, neglects or refuses to become a party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance until the next term of said court."

The procedure indicated in the above section was followed to the letter. The court below set aside the writ upon the ground that the writ of

scire facias must operate upon a judgment, and was not applicable to a proceeding where a judgment had not yet been obtained. We contend that this decision was erroneous, that the order quashing the writ of *scire facias* was void, and that the court could not divest itself of the jurisdiction that it had acquired.

There have been no judicial constructions of this section upon this point, either for or against the view of it which we have taken; at least, none that careful investigation by counsel on both sides below brought to light. It is *res nova*, and we respectfully submit to the court that the plain language of the statute indicates that Congress intended that the writ of *scire facias* should operate to revive the action, no matter at what stage it abated, whether before judgment or after judgment, or before service of process or after service of process, so long as the action was commenced within the lifetime of the defendant; and the action, as we shall see hereafter, is commenced in the state of California from the time of filing the complaint.

The writ of *scire facias* for any purpose whatever is unknown to the jurisprudence of California. Its place in that state is supplied by various remedial proceedings. This accounts for the reluctance of the Circuit Judge to avail himself of a writ to which he was unaccustomed.

He was under the impression that the use of the writ of *scire facias* was limited, that it issued only to revive a judgment, and that it could not be used to bring in an executor as a party to a proceeding when no summons had been served on the decedent in his lifetime. Such a construction is unwarranted by the language of the statute. Section 955 Revised Statutes says: "When either of the parties * * * * dies before final judgment." It does not say: "dies *after service* and before final judgment," but merely *before* final judgment.

The statute further provides that after service of *scire facias*, and failure of the executor to *become a party*, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. It cannot be denied that if an action had been pending against deceased at the time of his death, the executor could have voluntarily appeared to defend it without awaiting a new suit to be brought against the estate. If that be true, the failure of the executor to appear in obedience to the *scire facias* would have authorized the court to render judgment against him *in the same manner as if he had voluntarily* made himself a party.

There is no reason in law why the operation of the section should be restricted in the manner in which it would be by the construction given it by the Circuit Court. The proceeding is a simple and adequate one.

What difference can it make to any person whether the deceased party was actually in court at the time of his death. No person is injured, no one deprived of notice. The trial judge had a theory that when a suit was brought and no summons served upon the defendant, the action abated by his death, but that a new suit might be brought. The fallacy of this theory is apparent when we consider the consequences. Suppose a case where the action is commenced within the time allowed by law, but that the service of process is delayed until after the lapse of the period for the commencement of a new action. If, then, the defendant die before service of process, the right of action against him or his estate would be lost. No such situation was intended to be suffered by section 955.

The use of *scire facias* for the purpose of continuing an action against the representatives of a deceased person is not common in the states. It is the mode adopted in Vermont (see Tyler v. Whitney, 8 Vt. 27), and perhaps in a few others. In no state have we been able to find any distinction made such as was made in the court below.

II.

UNDER THE CALIFORNIA CODE, AN ACTION MAY BE CONTINUED AGAINST THE REPRESENTATIVES OF A DECEASED PERSON, NOTWITHSTANDING DECEDENT WAS NOT SERVED WITH PROCESS IN HIS LIFETIME.

The ground upon which the trial court refused to entertain jurisdiction was that deceased defendant not having been served with process in his lifetime, the action abated by his death.

This was unquestionably a wrong conclusion from the statutes of California.

The California Code of Civil Procedure, section 385, provides:

"An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest."

Again, section 405 of the same code provides:

"Civil actions in the courts of this state are commenced by filing a complaint."

The uniform practice in the courts of California has been to suggest the death of the party and have a summons issue to bring in the personal representative.

In the case of Judson v. Love, 35 Cal. 463, the Supreme Court of California said:

"It is regular and proper to suggest the death of a party in any court, at any stage of the proceedings."

In the case of Taylor v. Western Pac. R. R. Co., 45 Cal. 323, the same court said:

"It has been the uniform practice in this state, from its organization, so far as we are advised, to permit the substitution to be made, on a suggestion of the death of the former party, and satisfactory proof on an *ex parte* motion of the appointment and qualification of the administrator. We are not aware that any inconvenience or injustice has resulted from this practice, and we see no good reason for changing it."

In Campbell v. West, 93 Cal. 653, it said, quoting section 385:

"The practice in this state is well settled in such cases, for courts to allow the substitution to be made upon suggestion of the death of a party, and on an *ex parte* motion showing the appointment and qualification of the executor or administrator of the estate of the deceased party."

The precise point in question has never been decided by the Supreme Court of California, but the foregoing authorities will suffice to show the liberal spirit of the California courts in permitting the substitution of executors as parties.

But while never passed upon in California, the question has been before the courts elsewhere.

The Supreme Court of Montana considered it in the case of Lavell v. Frost, 16 Mont. 93, construing the Montana statute corresponding to section 385 of the California Code. In that case, one Frost was sued and died after the complaint was filed. The Supreme Court of Montana said:

"It does not appear whether Frost was served with summons before his death, but the action was commenced before his death. An action is commenced by filing a complaint. (Code Civ. Proc., § 66.) 'An action or defense shall not abate by the death of a party, but shall survive and be maintained by his representatives.' (§ 22.) * * * * So far as we are of opinion, there was no error in the case."

The Supreme Court of Michigan ruled similarly in the case of Gordon v. Tyler, 53 Mich. 630, using the following language:

"The basis of this objection is that until a defendant has appeared the suit cannot be treated as having actually been commenced against him, so that if he dies before appearance it is as if he had never been in the case, and an original bill is necessary to reach his representatives.

* * * * The authorities and practice have uniformly held that the filing of a bill is the commencement of a suit for most purposes, and we can see no reason for adopting any exceptional rule in such cases as the present."

This ruling was affirmed by the same Court in Stevenson v. Krutz, 57 N. W. 580, the court saying:

"It is insisted, that inasmuch as there was no service of subpoena on James H. Stevenson before his death, there was no cause in court to be revived after his death. This point is ruled by Gordon v. Tyler, 53 Mich. 630, 19 N. W. 560, and 20 N. W. 70."

The Supreme Court of Kentucky in the case of Lyle v. Bradford, 23 Ky. (7 T. B. Mon.) 111, spoke as follows:

"The right of a complainant, after the death of the defendant, to revive his suit against the representatives of the deceased defendant, whether the death happened before or after service of process, is as firmly settled by the uniform and immemorial usage of courts of equity, as if it were expressly given by legislative enactment. We have no recollection of any case in which the right of a complainant to revive against the representatives of a defendant dying before the service of process upon him, has been expressly decided, but the practice to revive in such a case, has hitherto been uniform and uninterrupted, and *the lack of adjudged cases on the point only argues that the correctness of the practice has never heretofore been doubted.*"

In the case of Hubbard v. Johnson, 77 Me. 139, it was held that "suit is commenced when a writ is actually made with intention of service, and an executor may be brought in by revivor, though no service has been made on the testator."

In Heard v. March, 66 Mass. (12 Cush.), 580, a bill in equity was filed against three defendants praying for reconveyance of certain land and to set aside a deed. A demurrer interposed to the bill by March, one of the defendants, in which Otis, another defendant, afterwards joined, but no service was made on Binney, he being at the time absent in Europe, where he died, March 1, 1847, leaving a will. A bill of revivor was accordingly filed at November term 1848, against the executors and against March and Otis. To this bill of revivor a demurrer was filed by the executors of Binney on the ground, that as no service had ever been made on Binney, the bill could not be revived as against the executors. The court overruled the demurrer.

The authorities cited are amply sufficient to show that service of process need not be made upon a person in his lifetime in order that the action may be revived against his representatives. To hold otherwise not only serves no useful or logical purpose, but is contrary to the

spirit of enlightened jurisprudence which does away with unnecessary technicality.

The learned judge of the Circuit Court in deciding the case below, argued in the following language:

"Section 416 of the Code of Civil Procedure of California provides: 'From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication where service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties and to have control of all subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him."

"In the case at bar the summons was not served upon the defendant, O. P. Overton. Where the death of the defendant occurs before the service of the summons is completed, the court has acquired no jurisdiction, and the action abates, unless saved by Statute, 5 Enc. of Pleading and Practice. 823. In the case of White vs. Johnson, 27 Oregon, 282, the facts bear a close resemblance to those of the case at bar, in the matter of the service of the summons. Defendant had died after the issue and prior to the service of the summons upon him. His executrix was served with summons and judgment was rendered against her by default, upon her refusal to appear or plead thereto. In the course of the opinion in this case, Justice Wolverton quotes from the case of Auerbach vs. Maynard, 26 Minn. 421, 4 N. W. 816, in which it is said by Berry, J.:

"Then under Section 69 (Sec. 5209, Gen. Stats. Minn. 1894). from the time when the service is thus complete, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings. If the party upon whom the service is being made dies before it is complete—that is, before the required publications have been made—the service cannot be completed, there being no person in being upon whom to make it; and whatever has been done short of complete service is of no avail and the court acquires no jurisdiction through it." Whereupon the learned justice adds: "Thus it appears that the court is without power or authority to take any action looking to the rendition of a personal judgment merely, without first attaining jurisdiction through the service of a summons upon the defendant. *Aliter*, from the time of the service of the summons, the court has control of all subsequent proceedings."

"The facts in the case at bar and the law stated in the section of the Code of Civil Procedure quoted above, lead to the same conclusion as in the case cited. This court has acquired no jurisdiction in this case that will authorize it to proceed against the personal representatives of the

deceased. The service of the summons upon the defendant O. P. Overton was an essential preliminary to the proceedings necessary to acquire such jurisdiction."

In arriving at the conclusion which he did, the learned judge fell into two serious errors.

1st. He failed to distinguish between jurisdiction of the person and jurisdiction of the action, and

2nd. He followed a decision of the Supreme Court of Oregon based upon a statute essentially different from the California statute.

In support the proposition that personal service of the original defendant is necessary before the representative of the deceased can be brought in as defendant the learned judge cited section 416 of the California Code of Civil Procedure.

It is conceded that service of the defendant is necessary to obtain jurisdiction of his *person*, but sec. 405 of the Code provides that: "Civil actions in the courts of this state are commenced by filing a complaint"; this is to say the court has jurisdiction of the action as soon as a section 405 is complied with by the filing of the complaint. When a defendant dies, even after service of process upon him the court *ipso facto* loses its jurisdiction of *him*, and acquires no jurisdiction over his representatives until they are brought in as provided for in the section 385 C. C. P. It is evident that the jurisdiction which the court had over the person of the deceased, before his death, and which was lost by his death, could in no way affect the rights of the representative. Whether there had been service or not upon the deceased would make no difference to the representative of the estate and as there is nothing in section 385 or any other place in the Code which would warrant any distinction between a case where service has been made and where there has been no service we think the decision rendered by the learned judge is erroneous.

The decision of the Supreme Court of Oregon which the Circuit Court followed was based upon section 62 of the Oregon Code of Civil Procedure, which reads:

"From the time of the service of the summons or the allowance of a provisional remedy, the *court shall be deemed to have acquired jurisdiction* and to have control of all subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."

The California Code reads, section 416:

"From the time of the service of the summons * * * * the court is deemed to have acquired jurisdiction *of the parties* and to have control of all subsequent proceedings."

The California statute expressly states that the jurisdiction acquired by the service of the summons is *jurisdiction of the person.* It is that alone which is lost by failure to make the service.

The learned Circuit Judge overlooked the distinction between personal jurisdiction and jurisdiction over the action, and also lost sight of the two other sections of the Code of Civil Procedure, viz., sections 405 and 385 quoted *supra.*

We submit that sec. 416 will in no wise warrant the construction given it in the opinion, and that read in connection with the other two sections just cited the conclusion reached by the court is unquestionably erroneous. The Oregon decision is likewise easily distinguishable on account of the difference in the language of the statutes of the two states.

Our theory is further borne out by the Minnesota case of Auerbach v. Maynard, cited by the Oregon court. The statutes of Minnesota upon which the Minnesota case was decided are as follows: Section 13, General Statutes, reads: "An action is commenced as to such defendant when the summons is served on him." Section 69 reads: "*From the time of service of the summons* in a civil action the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings."

It will be seen that the language of section 69 of the Minnesota statute is identical with the language of section 62 of the Oregon statute. In the Auerbach case, the court construing various statutes of Minnesota, held that in order for an action to be commenced, in the meaning of the statute above quoted, it was necessary in the case of service by publication that the summons should be delivered to the sheriff and certain publications made. These publications not having been made before the death of the defendant, the court held that the action was not commenced, within the meaning of section 13, at the time of his death; a construction of the statute manifestly correct and in no way controlling the questions involved in this case. *Vide* Auerbach v. Maynard, 26 Minn. 421.

It is respectfully submitted therefore that of the two methods pursued by petitioner to confer jurisdiction upon the Circuit Court each was sufficient in itself, that the refusal of that court to take jurisdiction of the action of Connaway v. Overton was wrongful and that a writ of *mandamus* ought to issue to the Circuit Judges of the Ninth Circuit commanding to take jurisdiction and proceed with that case.

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